

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case no: 2023-014861

In the matter between:

**ORGANISATION UNDOING TAX ABUSE NPC
(Registration no: 2012/064213/08)**

Applicant

and

**THE PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA N.O.**

First Respondent

**THE HEAD OF NATIONAL DISASTER
MANAGEMENT CENTRE N.O.**

Second Respondent

**THE MINISTER FOR CO-OPERATIVE
GOVERNANCE AND TRADITIONAL AFFAIRS N.O.**

Third Respondent

**THE MINISTER OF MINERAL RESOURCES
AND ENERGY N.O.**

Fourth Respondent

THE MINISTER OF PUBLIC ENTERPRISES N.O.

Fifth Respondent

SPEAKER OF THE NATIONAL ASSEMBLY N.O.

Sixth Respondent

**CHAIRPERSON OF THE NATIONAL COUNCIL
OF PROVINCES N.O.**

Seventh Respondent

**ESKOM HOLDINGS (SOC) LTD
(Registration no: 2002/015527/20)**

Eighth Respondent

FILING NOTICE

DOCUMENT FILED: SUPPLEMENTARY FOUNDING AFFIDAVIT – S FICK

DATED AT PRETORIA THIS 7TH DAY OF MARCH 2023.



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TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT
PRETORIA

AND TO: **STATE ATTORNEY PRETORIA**
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SERVICE VIA EMAIL AS AGREED

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SUPPLEMENTARY FOUNDING AFFIDAVIT

I, the undersigned,

STEFANIE FICK

do hereby make oath and say:

1. I am an adult female executive director of the applicant's Accountability Division with offices situated at Unit 4, Boskruin Village, Cnr President Fouché and Hawken Road, Bromhof, Johannesburg, Gauteng. I deposed to the founding affidavit in this matter on 16 February 2023 and am duly authorised to depose to this affidavit on behalf of the applicant.
2. The facts contained herein fall within my personal knowledge, save where otherwise indicated or appears from the context, and are true and correct.
3. Submissions of a legal nature are made on the advice of the applicant's legal representatives, which advice I accept as correct.
4. This affidavit serves to supplement the applicant's founding affidavit as provided for in Uniform Rule 53(4), subsequent to the furnishing of the record on 3 March 2023. Where I use bold font or underline quoted passages for emphasis, such emphases are my own.
5. For the sake of convenience, I will use the same abbreviations as used in the founding affidavit and will refer interchangeably to the first respondent as "the President". For ease of reference, relevant parts of the record are identified and attached hereto, and the numerical order of the annexures follows on that used in the founding affidavit.



A. THE 28 FEBRUARY 2023 COURT ORDER AND FURNISHING OF THE RECORD IN TERMS OF RULE 53:

6. The applicant brought its application in two parts:
- a) Part A: to obtain interdictory relief pending production of the record by the second and third respondents and finalisation of the review proceedings; and
 - b) Part B: to review and set aside the decision by the second respondent to classify the electricity crisis as a national disaster and the decision by the third respondent to declare a national state of disaster (together referred to as “the impugned decisions”). The normal time periods allowed for in Rule 53 would be applicable to the review proceedings under Part B of the notice of motion.
7. The matter was opposed by the first to fifth respondents and Part A was enrolled on the urgent court roll for hearing on 28 February 2023. The first to fifth respondents failed to adhere to the time periods specified in the notice of motion and at the time of final enrollment on Thursday 23 February 2023 no answering papers had been filed.
8. The parties reached agreement on 27 February 2023 prior to the hearing of the matter on 28 February 2023 that Part A, wherein the applicant requested interdictory relief, would be removed from the urgent roll for that week but that

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truncated time periods for the furnishing of the record and filing further affidavits in Part B ("the review application") would be applicable and that the review application would be enrolled on an expedited basis.

9. The agreement was made an order of court by the Honourable Millar J on 28 February 2023 and is attached as annexure "FA14". In terms of the order the record was to be delivered on Friday 3 March 2023 at 14:00.
10. In contravention of the court order, the record was only furnished by way of email on Friday 3 March 2023 at 21:36, again indicating the respondents' cavalier attitude towards court proceedings and -orders. It is clear that the second and third respondents do not consider themselves bound by court orders and the Honourable Court will be requested to show its displeasure with this conduct when awarding a cost order.
11. The relief before the Honourable Court in Part B of the application, being the review application, only pertains to the second and third respondents as the decision-makers. Insofar as this relief in the review application goes, the other respondents are interested parties and no direct relief is requested against them.
12. The applicant maintains that the review application is urgent on the grounds as set out in the founding affidavit. From the court order granted on 28 February 2023 it is also evident that the parties agreed for the matter to be enrolled on



an expedited basis once the papers have been filed in accordance with the truncated periods.

13. Following review of the record of the proceedings which led to the classification of a national disaster by the second respondent and the declaration of a national state of disaster by the third respondent, the applicant stands by the grounds for review as set out in the founding affidavit, supplemented as set out herein.
14. The record confirms the arbitrary manner in which the second and third respondents took the impugned decision, despite the fact that the relevant stakeholders (including the third respondent herself) had pointed out that there was sufficient legislation in place to deal with the electricity crisis and that the definition of a national disaster under the DMA was not met.
15. The Guidelines prepared by the Directorate: Policy Development and Regulatory Frameworks (record at p 104 – 170) refer to the declaration of the state of disaster and/or the making of regulations and/or issuing directions as an administrative action under PAJA. I attach the relevant two pages (record at p 126 – 127) hereto as annexure “**FA15**” where the Guidelines deal with the *Declaration of a state of disaster* in paragraph 8 thereof. More specifically, in paragraph 8.1 under the heading “**Process to declare a state of disaster**”, the following is stated:



“...the Ministers, Premiers and Councils do not have original legislative competence. They must act within the confines of the enabling legislation, such as the DMA insofar as it relates to declaring a state of disaster, issuing Regulations and or issuing directions. The making of such delegated legislation by a Minister, a Premier and a Council has been stated by the Constitution as an essential part of the public administration, in that it gives effect to legislative provisions through implementation of policies, procedures and programmes. However, according to the Promotion of Administrative Justice Act, 2000 (Act No 3. of 2000) (PAJA) the test to determine if administrative action¹ taken by the executive of council is just, is based on three elements.

(Element 1) The administrative action must be lawful;

(Element 2) The administrative action must be reasonable; and

(Element 3) The administrative action must be procedurally fair.

In the context of exercising the administrative power to declare a state of disaster, the executive or a council as the case may be, has the power to lawfully declare a state of disaster (element 1) once it is classified by the NDMC, but should only do so after having considered whether it is reasonable (element 2). This requires that the executive or council, in making a decision to declare a state of disaster, exercises sound judgment, fairness and sensibility with regards to the application of existing legislation, the applicable contingency arrangements, the needed Regulations (or bylaws in the case of Council) and or the needed Directives. This speaks to following sound decision-making

¹ *“in this case declaring a state of disaster, and or making regulations and or issuing directions”*

procedures based on the facts provided by the disaster assessment report(s) collected, which in turn promotes procedural fairness (element 3). When these elements are put to effective use, it enables the executive or a council to lawfully declare a state of disaster.”

16. These guidelines thus confirm the position that the impugned decisions fall within the PAJA definition of administrative action. Both impugned decisions entailed administrators exercising a public power in terms of the enabling legislation, the DMA, affecting the rights of the South African public. Both impugned decisions therefore stand to be reviewed in terms of the provisions of PAJA.
17. However, the record also illustrates that both the second and the third respondents acted unlawfully and outside the powers conferred upon them by the DMA in the exercising of their public powers to reach the impugned decisions. The impugned decisions accordingly in the alternative fall to be reviewed in accordance with the principle of legality.

B. AN OVERNIGHT CHANGE OF POSITION BY THE SECOND AND THIRD RESPONDENTS:

18. The record shows that, up until 6 February 2023, and after having had the benefit of presentations by several role-players, as well as having conducted a compliance assessment in terms of section 23 of the DMA, the National Disaster Management Centre (“the NDMC”) held the view that the electricity



crisis does not fall within the application of the DMA as set out in sections 2(1)(b) and 23 thereof, and that sufficient national legislation exists that empower the executive to deal with the prevention and mitigation of the impact of the energy crisis.

19. Two days later, on 8 February 2023, the second respondent appears to have changed his mind and decided to classify the electricity crisis as a national disaster without any new facts or independent assessments. This decision was blindly followed by the third respondent when she declared a national state of disaster without any new facts and contrary to the opinions of the relevant stakeholders (including herself).

(i) **Position on 23 January 2023:**

20. It appears from the record (at p 171 – 178) that the impugned decisions had their origin in a letter that the premier of the Western Cape addressed to the first, second, third, fifth and eighth respondents on 17 January 2023 in support of the declaration of a national state of disaster regarding the electricity crisis.
21. On 19 January 2023, the office of the President requested the third and fifth respondents to submit a draft response to the letter referred to above by 23 January 2023 (record at p 175).



22. The third respondent's response to the President dated 23 January 2023 is attached as annexure "FA16" (record at p 191 – 195) and reveals *inter alia* the following:

22.1 The third respondent conducted an assessment of the definition of a "disaster" as contained in the DMA and informed the President that *"Both the determination of a disaster and the classification processes fall within the responsibility of the National Disaster Management Centre (NDMC) which I oversee"*.

22.2 *"The NDMC requested the Department of Public Enterprises (DPE) to submit information to outline the actions they are taking to address the matter and specifically to indicate whether there are sufficient legislative measures at the disposal of the DPE and ESKOM to effectively deal with the load shedding crisis."*

22.3 The DPE provided a presentation of Eskom to stakeholders, detailing an action plan. ***"The Director-General in the DPE further confirmed that at this stage, there is adequate national legislation to deal with the loadshedding crisis..."***.

22.4 *"The NDCM has informed me of their view that whilst the energy crisis that the country face may fall within the broad definition of a disaster as set out in section 1 of the DMA, **the occurrence does not fall within the application of the DMA as set out in sections 2(1)(b) and 23.***



There is sufficient national legislation that exists that empower the executive to deal with the prevention and mitigation of the impact of the energy crisis. These include but are not limited to the National Energy Act No. 34 of 2008; the Public Finance Management Act, 1 of 1999; the Preferential Procurement Policy Framework Act, 2000; the Division of Revenue Act; the Constitution of the Republic of South Africa; the Intergovernmental Relations Framework Act and various pieces of legislation that deal with sector related contingencies.”

- 22.5 The third respondent confirmed to the President that she had been informed that further practical measures within the legislative framework had already been implemented such as the amendment of schedule 2 of the Electricity Regulation Act to remove the licensing requirements for generation projects, which would also significantly accelerate private investment.
- 22.6 A new ministerial determination was published for 14777MW new generation capacity from wind, solar and battery storage to accelerate further bid windows.
- 22.7 Existing legislation is already being used to accelerate implementation of measures to reduce the impact of loadshedding.
- 22.8 Various actions have been completed to streamline and reduce authorisation processes for energy projects.



23. In summarising her response and findings to the President, the third respondent then *inter alia* stated in the last two pages of her letter (record at p 194 – 195):

“The energy crisis therefore does not forthrightly fall within the ambit of the DMA. However, the NDMC continues with the engagements of relevant stakeholders to enable a rational and informed decision as well as proper application of the DMA.

.....

As alluded to above, it should be emphasized that the impact of loadshedding is already being addressed by relevant organs of state through contingency arrangements and existing legislation and various structures have been established by government for the coordination of efforts by relevant organs of state in addressing the matter.

.....

It follows that the energy crisis should be addressed as a matter of extreme priority noting that the impact is dire across all sectors of society. However, the classification of a disaster in terms of section 23 of the DMA and the declaration of a national state of disaster in terms of section 27 of the DMA may not be the appropriate mechanisms to achieve this, particularly as the Department of Public Enterprises and ESKOM have assured us that there is sufficient legislative and other mechanisms to deal with the energy crisis.




24. The letter then ends with an invitation to address any queries to the second respondent.
25. On the same day, 23 January 2023, the fifth respondent also replied to the president with the letter attached as annexure “FA17” (record at p 196). The letter does not provide an express opinion on the declaration of a national state of disaster, but the last two paragraphs read:

“Government has always been transparent in the way the issue of loadshedding is being dealt with. Furthermore, Government has been collaborating with different organisations on the energy crisis and continues to do so.

Please find attached the presentation made at the PCC meeting.”

26. There is no mention of any inefficiencies of the existing legislation in the fifth respondent’s letter. The fifth respondent attached the Eskom presentation entitled *Eskom Loadshedding Update* to the letter (record at p 179 – 190) and hereto attached as annexure “FA18”.
27. Notably, the Eskom presentation that was presented to the President on 23 January 2023 by the fifth respondent, is merely an update on loadshedding and does not in any respect refer to an impending national disaster. To the contrary, the plan contains a roadmap to end loadshedding and on page 6 thereof (record at p 183) lists the “*Successes achieved thus far*”. These *inter alia* include



relaxation of procurement requirements by Treasury and collaboration among external stakeholders with a willingness to assist Eskom.

28. The presentation further provides a current plant status and forward view (record at p 184). It is not mentioned anywhere in the presentation that the declaration of a state of disaster is required for Eskom to move ahead with its Energy Action Plan and all the associated steps to reduce and eventually end loadshedding.
29. The Eskom presentation also does not make any mention of a possible progression to a total blackout.

(ii) **Position on 1 February 2023:**

30. The record (at p 197 and 207) shows that on 1 February 2023, a consultative session was held by the Department of Co-operative Governance with the Special Heads of Disaster Management Centres and the Special National Disaster Management Advisory Forum via the online platform MS Teams.
31. The unsigned minutes for this meeting with these respective groups provided as part of the record (at p 203 – 206 and 208 – 211) are identical, although the attendance lists differ. It is therefore assumed that just one meeting was held to which the representatives of the respective parties were invited. A copy of the unsigned minutes is attached as annexure “FA19”. It appears from the minutes that Eskom, the Department of Public Enterprises (“the DPE”), the

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Department of Planning, Monitoring and Evaluation ("DPME") and members of the National Energy Crisis Committee ("NECOM") were invited to give presentations at the meeting(s).

32. Of particular importance is the following contained in Point 2 the minutes under the heading *Matters for Consideration*:

- a) Under point 2.1: Presentation from Department of Public Enterprises:
Plans to mitigate the current Energy Crisis DPE – by DG. Jacky Molisane

"The DPE like Eskom indicated that all these measures can be addressed through existing legislation and working with stakeholders in the respective work streams of the NECOM to improve coordination and cooperation."

- b) Under point 2.2: Presentation from NECOM – Overview of the Energy Action Plan by Mr Saul Musker. This presentation highlighted 4 points summarised as follows:

- (i) the roadmap for the Energy Action Plan to end severe electricity supply constraint;
- (ii) nine workstreams that have been established to ensure delivery against the plan comprising key government officials and leading experts from academia, business and society;



- (iii) good progress made in several areas which will result in delivery of new capacity within the next 12-18 months; and
 - (iv) work already underway to streamlining regulatory processes across departments ***“and indicated that the timeframes can be further reduced through cooperation and engagement in the NECOM using existing legislative measures”;***
 - (v) emphasis placed on the need to accelerate implementation on an action plan and move with speed implementing these initiatives.
- c) Under point 2.3: Presentation by Eskom: Energy Crisis – Mr Thomas Conradie. Mr Conradie highlighted certain aspects regarding the severe electricity supply constraint and then presented the following:

“That all the above-mentioned measures can be addressed through existing legislation and working with stakeholders in the respective work streams of the NECOM to improve coordination and cooperation.”

- d) At the end of point 2.3 (record at p 205) it is minuted:

“In addition the forum noted considering a national state of disaster would also put additional responsibilities on managing fraud and corruption issues.



giving the potential for these to increase in that period, and there is also an element around the measures required to secure our infrastructure, both all generation transmission and distribution around economic crimes, we've seen with the recent videos of the extent of economic crimes that happens against distribution, transmission and generation infrastructure...."

e) Under point 3: Discussion/Comments/Questions, the following is minuted:

"In terms of accelerating the laid out plans from the presentations, a question was raised to whether a state of disaster is needed or not. It was then requested that the legal work stream that is operating in NECOM to then do the work they need to do in order to provide the NDMC with clarity as to what are the exact regulatory issues that cannot be dealt with within the existing legislation. Because from the presentations it was clear that that is the minority and that even in those cases it seems that it can be dealt with. So the question in short would be can the issue be accelerated using the state of disaster? What would those measures be and are we clear that those measures cannot be achieved, you know, within the existing regulatory framework."

33. It is therefore clear that as at 1 February 2023, all the available information and presentations by the relevant role-players that the second and third respondents had at their disposal, pointed to there being sufficient existing legislation to deal with the crisis.



(iii) **Position on 3 February 2023:**

34. On 3 February 2023 the Chief Executive Officer of Agri SA, Mr Christo van der Rheede, addressed a comprehensive letter to the second respondent, representing 9 provincial and 26 commodity organisations as well as 58 corporate organisations within the agricultural value chain.
35. The letter (record at p 326 – 341) is attached as annexure “**FA20**” and contains a comprehensive analysis of the impact of loadshedding on South Africa’s Agricultural Industry. It also contains an assessment of the advantages and disadvantages of declaring a state of disaster, as well as several recommendations for improving capacity.
36. Importantly, on the second last page of the letter under the heading *Classification of State of Disaster*, the following recommendation is made by Agri SA:

*“In view of the National Disaster Management Advisory Forum meeting held on 1 February 2023, Agri SA consulted its members on whether the current energy crisis should be classified as a state of disaster. Given the current information to our disposal the majority of our members are of the view that we should **NOT support** classifying the energy crisis as a state of disaster, while the minority support the classification.*

It is motivated by the following reasons:



1. *Already established structures within the Presidency's being the National Energy Crisis Committee, are attending to the issues through the nine workstreams;*
2. *Eskom could not provide short term interventions by which the NDMC could assist if classified as a state of disaster;*
3. *Agri SA is of the opinion that there is existing legislation that can be leveraged to manage the energy crisis;*
4. *This classification will set a precedent for future government failures being declared as disasters;*
5. *The purpose of the Disaster Management Act was not intended for classifying/declare state of disasters due to failing government entities."*

37. Therefore, in addition to ESKOM, the DPE, NECOM, and up until 8 February 2023 the third respondent herself, as well as Agri SA, one of the major stakeholders representing a diverse group of emerging, smallholder and commercial farmers, did not support the classification- and declaration of a national state of disaster.

(iv) **Position on 6 February 2023:**

38. The record shows (at p 342 – 348) that on 6 February 2023, three days before the declaration of a national state of disaster, the NDMC under the leadership of the second respondent, conducted a *Section 23 Compliance Assessment* on

the impact of electricity crisis in the country. The assessment is attached as annexure “FA21”.

39. The following view is *inter alia* expressed by the NDMC in this assessment under the heading *NDMC comments*:

“The NDMC is of the view that whilst the energy crisis that the country is facing may fall within the broad definition of a disaster as set out in section 1 of the DMA, the occurrence does not fall within the application of the DMA as set out in sections 2(1)(b) and 23. There is sufficient national legislation that exists that empower the executive to deal with the prevention and mitigation of the impact of the energy crisis. These include, as confirmed in the presentation by the DPE but is not limited to:

- *Public Finance Management Act (PFMA), 1999*
- *Electricity Regulation Act (ERA), 2006*
- *Preferential Procurement Policy Framework Act (PPPFA), 2000*
- *National Environmental Management Act (NEMA), 1998*
- *National Nuclear Act, 2004*
- *Companies Act, 2008*
- *National Energy Regulator Act, 2004*
- *National Treasury Regulations*
- *Occupational Health and Safety Act, 1993*
- *Broad-Based Black Economic Empowerment Act, 2003*
- *Promotion of Access to Information Act, 2000*



- *Labour Relations Act, 2000*
- *Division of Revenue Act*
- *Intergovernmental Relations Framework Act*
- *Constitution of the Republic of South Africa,
and various pieces of legislation to deal with sector related
contingencies.”*

40. Under the column with heading *Analysis of compliance*, it is noted at p 2-3 of the assessment (record p 343 – 344) under the question “**Whether this event should be regarded as a disaster?**”:

*“Based on the above analysis of the situation, the requested more information and the updated information received did not give any new or different view on the interventions. **Up until the NDMC received different information the situation yet does not qualify to be classified as a disaster.** Application of section 2(1)(b) is still applicable.”*

41. And in the column underneath what is quoted above:

“The energy crisis therefore does not forthrightly fall within the ambit of the DMA.”

42. In the column at page 5 – 6 (record p 346 – 347) where an analysis of section 23 of the DMA is provided:



“Classification of a disaster in term (sic) of section 23 and declaration of a national state of disaster in terms of section 27, is not supported at this stage. All processes/plans to address the loadshedding issues must be allowed to unfold.”

(v) **Position on 8 February 2023:**

43. The record shows that nothing further happened between 6 February 2023 and 8 February 2023. No new facts came to light during this period. No new consultations or meetings with any stakeholders are recorded. Yet, on 8 February 2023 the second respondent, with the same information at his disposal as two days prior, embarked on what seems to be a frolic of his own and advised the third respondent *“that the NDMC had changed its position and had decided to classify the impact of the severe electricity supply constraint as a national disaster.”* (Quote taken from the third respondent’s reasons more fully referred to in paragraphs 55 and 56 below, record at p 384)

44. The decision appears to rest on a hunch developed by the second respondent overnight that the electricity crisis **“may”** suddenly be a disaster. The sudden change in tack is explained in the *Section 23 Compliance Assessment, 8 February 2023* (record at p 349 – 355) attached as annexure **“FA22”** under the heading **“Application of the Act”**:

“In this regard the NDMC is of the view that although there are various pieces of legislation to deal with sector related contingencies and there is a plan in



place to address this situation, the efficacy of the existing pieces of legislation cannot be determined in the context of managing the severe electricity supply constraint, with the view to prevent a blackout from occurring.

Therefore legislative measures cannot be gazette as indicated in the DMA, and thus the occurrence may fall outside the requirements set by Section 21(1)(b) of the DMA. As a result, the section 1 of the DMA which is the definition of a disaster i.e. (threatening to cause a disaster) may apply to deal with the view to prevent a blackout from occurring.”

45. There is no indication of what process the second respondent followed to reach the conclusion that the efficacy of the existing pieces of legislation cannot be determined, or whom he consulted for purposes of reaching this conclusion. It is further evident that the classification of the state of disaster was premised on speculation by the second respondent that the definition of a disaster **may** apply.
46. The second respondent also speculated that it was necessary to prevent a blackout from occurring, whilst there is no information pointing to an imminent blackout. To the contrary, and as pointed out in my founding affidavit, Eskom confirmed that the possibility of progression to a total blackout is no higher than before.
47. It is evident from annexure “FA22” that South Africa was thrown into a national state of disaster because of the second respondent’s alleged inability between 6 – 8 February 2023 to determine the efficacy of existing legislation even though

Eskom, the DPE, NECOM and the third respondent expressed the view that the existing legislation was sufficient to deal with the crisis. The record further does not show that the second respondent conducted any proper evaluations of assessments of the existing legislation to have reached this conclusion. The reasoning shows he was uncertain about the effect of existing legislation, and based on this uncertainty, thought it prudent to classify the electricity crisis as a national disaster.

48. In an undated letter and PowerPoint presentation by the second respondent (record at p 356 – 371), both which are presumed to have been presented to the third respondent either on 8 or 9 February 2022, the second respondent informed the third respondent of *“the outcome of the process undertaken to classify the severe electricity supply constraint as a national disaster.”* The letter is attached as annexure **“FA23”** and the PowerPoint presentation as annexure **“FA24”**.

49. The letter (**“FA23”**) confirms the following:

- a) Eskom indicated that all the measures planned by it can be addressed through existing legislation and working with stakeholders in the respective work streams of the NECOM to improve coordination and cooperation (record at p 358);
- b) the NECOM highlighted work already underway to streamlining several regulatory processes across departments and indicated that the timeframes



can be further reduced through cooperation and engagement in the NECOM using existing legislative measures (record at p 358);

- c) the DPE, like Eskom, indicated that all the measures proposed by it can be addressed through existing legislation and working with stakeholders in the respective work streams of the NECOM to improve coordination and cooperation (record at p 358);
- d) the DPME indicated that the medium-term strategic framework (MTSF) of Energy Availability Factor (>80% by 2024) would not be achieved and recommended that this be independently assessed by the CSIR. The DPME also provided a summary of progress on the Energy Action Plan (record at p 358);
- e) the Department of Mineral Resources and Energy was represented at the meeting with the NDMC but did not present a specific position (record at p 358);
- f) at the second meeting which was a special meeting of the National Disaster Management Advisory Forum (NDMAF), a forum established in terms of the DMA to provide a mechanism for relevant role-players to consult one another, the stakeholders provided similar sentiments expressed in previous engagement (record at p 359), this position being that there was sufficient existing legislation to deal with the electricity crisis;

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g) National Treasury confirmed that there is no requirement to augment existing legislation that could only be achieved by disaster classification or declaration processes as there are adequate financial instruments in place within the existing fiscal framework (record at p 359).

50. Despite Eskom, NECOM, the Department of Public Enterprises and National Treasury having confirmed that there is sufficient existing legislation to deal with the crisis and despite, according to the record, not one of these stakeholders that were consulted having supported the notion that the existing legislation was *not* sufficient, the second respondent nevertheless decided to disregard all the relevant information that he had at his disposal and proceeded to classify the electricity crisis as a national disaster.

51. In fact, in his PowerPoint presentation to the third respondent (“FA24”), the second respondent went further to allege without any factual foundation (record at p 369):

- *“As per Section (1) and Section 2 of the DMA: The assessment indicates that the existing legislation is not efficient in managing the impact of severe electricity supply constraint and therefore this occurrence is consistent with the definition of a National Disaster in terms of section 1 of the Disaster Management Act.*
- *As per section 27(1)(a) of the DMA: the measures implemented are not effective to address the severe electricity supply constraint noting the*



prolonged and progressive impact of the severe impact of the electricity supply constraint."

52. The above is a blatant misstatement of the facts. The assessments that were in fact carried out, show that all the relevant stakeholders indicated that the existing legislation was sufficient. The record shows that there was no assessment carried out that justified the conclusion reached that the existing legislation is not efficient in managing the impact of the severe electricity supply. This is an opinion developed by the second respondent between 6-8 February 2023 unsupported by facts.
53. There is also no evidence in the record to show that the second respondent has any factual support for the statement made that *"the measures implemented are not effective to address the severe electricity constraint..."* The Energy Action Plan was designed to do just that. Although opinions have been expressed that the implementation of the Energy Action Plan needs to be accelerated, there is nothing to suggest that the measures are not working or will not work. To the contrary, in its presentation on 1 February 2023 to the Heads of Disaster Management Centres Forum (record at p 231 – 270) and its Overview of the Energy Action Plan: January 2023 (record at p 271 – 294) Eskom *inter alia* provided an overview of the progress to date as well as a summary of the successes achieved thus far.



54. These successes touted by Eskom are inconsistent with the second respondent's view that the existing measures are not effective in addressing the issues.
55. On 3 March 2023, the third respondent presented signed a document that was provided as part of the record with the heading *Reasons for the Decision to Declare a National State of Disaster* (record at p 381 – 390), attached as annexure “FA25” wherein she states at paragraphs 12 and 13 that the second respondent advised her on 8 February 2023 that the NDMC had changed its position and decided to classify the impact of the severe electricity supply constraint as a national state of disaster in terms of section 23(3) of the Disaster Management Act.
56. She then proceeds to state in paragraph 14 (record at p 384):

“14. I subsequently came to the view that a declaration of a state of disaster in terms of section 27 of the Disaster Management Act 57 of 2022 was necessary because:

14.1 The existing legislation and contingency arrangements were not sufficient to effectively deal with and mitigate the impact of the electricity crisis on the economy, essential infrastructure and the majority of South Africans; and

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14.2 *special circumstances warranted the declaration of a national state of disaster.*"

57. The "*subsequent realisation*" that the third respondent came to could only happen overnight between 8 February 2023 (when she had a meeting with the second respondent) and 9 February 2023 (when she declared a state of disaster).
58. It is clear from the record and the short period of time within which the third respondent changed tack that she (the third respondent) did not apply her mind and conducted her own assessment to ensure that the decision was in fact made in line with section 27(1) of the DMA. There is no indication as to what moved the third respondent, other than a conversation with the second respondent the day before, to change the position of her department.
59. The reasoning beyond the sudden change in position by both the second and third respondents from "*there is sufficient existing legislation to deal with the crisis*" to the polar opposite "*the existing legislation and contingency arrangements are not sufficient to effectively deal with the crisis*" cannot be found anywhere in the record.
60. There is also no mention in the record about a discussion regarding or reasoning beyond the "*special circumstances*" which the third respondent overnight decided applies. It appears, however, from paragraph 15.6.4 of the third respondent's reasons that she had regard to several newspapers articles



in coming to her decision, even though the majority of these articles were critical of the possibility of national state of disaster being declared.

61. The third respondent further uses examples of various sectors in paragraph 15.6.6 that were impacted by loadshedding. It is submitted that there are existing emergency measures in place to assist all these sectors and none of these constitute “*special circumstances*.”

62. The third respondent then states in paragraph 16 of her reasons:

“With these considerations in mind, I saw the need to implement measures in order to address the impact of load shedding. It became clear that the legislation referred to would not be sufficient to protect most South Africans who are affected by prolonged load shedding.”

63. It begs the question for which an answer is nowhere to be found in the record and the reasons provided: *Why would it not be sufficient?*

64. How could the alleged insufficiency of existing legislation have been clear to the third respondent when all of the relevant stakeholders confirmed that there was sufficient existing legislation? Assuming that the complete record was provided, the information that the third respondent had is the information contained in the record. Looking at the recommendations of all the relevant stakeholders (and the advice given by the third respondent herself to the

President on 23 January 2023), there is simply no rational basis on which such a change of position could be achieved within such a short period of time.

65. The way in which the second respondent dealt with the legal implications in his undated letter to the third respondent (presumed to have been written on 8 February 2023) is telling. In the paragraph on the last page of the letter (record at p 361) under the heading “**Legal Implications**” the second respondent states:

“It must also be considered that the declaration of a national state of disaster may lead to legal action taken against government considering several academic opinions inclined to hold the view that legal requirements to declare a NSOD are not met and that the intention of the DMA was not to address matters that could be regarded as government failures. The declaration of a state of disaster for something that can be perceived as service delivery failure may set a precedent for declaring states of disaster for other service delivery failures, especially in the local government sphere.”

66. Neither the second- nor the third respondent attained the requisite level of legal certainty with respect to compliance with the DMA before these far-reaching impugned decisions were taken. It is further submitted that both the second and third respondents failed to properly apply their minds in the hasty decision-making process that led to the impugned decisions.

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67. The timeline during which the second and third respondents' position abruptly changed as set out above can be summarised as follows:

67.1 on 23 January 2023 the third respondent advised the President that a national state of disaster is not warranted. This position is shared by the fifth respondent and Eskom;

67.2 on 1 February 2023 the second respondent holds meetings where Eskom, DPE and NECOM confirm is that there is sufficient existing legislation to deal with the electricity crisis;

67.3 on 3 February 2023 the CEO of Agri SA informs the second respondent that Agri SA does not support the classification of the energy crisis as a national disaster;

67.4 on 6 February 2023 the NDMC under the auspices of the second respondent, conducts a Section 23 Compliance Assessment and reaches the conclusion that the electricity crisis does not fall within the application of the DMA as set out in section 2(1)(b) and 23, and that sufficient national legislation exists to deal with the crisis;

67.5 on 8 February 2023 the NDMC under the auspices of the second respondents conducts another Section 23 Compliance Assessment and came to the conclusion this time around that the occurrence *may*

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fall outside the requirements of section 2(1)(b) of the DMA and that, as a result, the definition of “disaster” *may* apply;

67.6 also, on 8 February 2023 the second respondent met in person with the third respondent and appears to have informed her of his change in position;

67.7 on 9 February 2023 both the impugned decisions are published in the Government Gazette.

68. It is also worth noting that Regulations were first published on 28 February 2023, almost three weeks after the national state of disaster was declared. The same haste and urgency with which the impugned decisions were taken to assist, protect and provide relief to the public (according to the third respondent) were not reflected in the subsequent actions. It has not been demonstrated that the Regulations will or can lead to different outcomes from those achievable under existing legislation.

C. GROUND FOR REVIEW (AS SUPPLEMENTED):

a) Classification of a national disaster by the second respondent on 9 February 2023

69. In paragraph 99 of my founding affidavit (at 002-44), I submitted that the second respondent failed to comply with a mandatory and material procedure

prescribed by an empowering provision as required by section 6(2)(b) of PAJA, as he classified a national disaster in circumstances where he was prohibited from doing so by section 2(1)(b) of the DMA. The record confirms that the second respondent did not establish with the requisite degree of legal certainty that the definition of "disaster" under section 1 read in conjunction with section 2(1)(b) of the DMA was satisfied prior to his classification decision.

70. The second respondent's impugned decision was materially influenced by an error of law as provided for in section 6(2)(d) of PAJA in that the evidence before him from all relevant stakeholders at the time of making the decision, was that there is sufficient existing legislation to deal with the crisis. The impugned decision was reached without any basis in law.
71. The record shows that, during the meetings that were held and presentations that were made, all the relevant stakeholders (to include Eskom, NECOM, the DPE and the third respondent) expressed the view that the definition of a disaster was not met and that there was sufficient existing legislation to deal with the electricity crisis. The second respondent was further aware of academic opinions that held the view that the legal requirements to declare a national state of disaster are not met.
72. There is no indication in the record that the second respondent obtained a single independent opinion that shows otherwise before having made the impugned decision. Relevant considerations were therefore not considered whilst irrelevant considerations were taken into account in reaching the



decision. The decision therefore stands to be reviewed in terms of section 6(2)(e)(iii) of PAJA.

73. The record further shows that the second respondent almost literally overnight changed his position despite there not having been any new facts or intervening factors between 6 February 2023 (when the NCDM held the view that classification of a national disaster was not justified) to 8 February 2023 (when the position changed). This was done arbitrarily and without any basis in fact or law and as such the decision stands to be reviewed in terms of section 6(2)(e)(vi) of PAJA.
74. The classification of a national disaster in circumstances where the definition of a disaster is not met, is not authorised by the empowering legislation and as such reviewable under section 6(2)(f)(i) of PAJA.
75. Given the fact that the record shows that all the relevant stakeholders advised that there is sufficient existing legislation to deal with the crisis, the decision, which was taken on pure speculation by the second respondent, was not rationally connected:
- a) to the purpose for which it was taken;
 - b) the purpose of the empowering provision; and
 - c) the information before the administrator.

and as such stands to be reviewed in terms of section 6(f)(ii) of PAJA.



76. The decision was further so unreasonable in light of the available information that no reasonable person could have come to the decision to classify a national disaster. The decision accordingly stands to be reviewed in terms of section 6(2)(h) of PAJA.
77. The decision was otherwise unconstitutional and unlawful and stands to be reviewed in terms of section 6(2)(i) of PAJA.
78. In the alternative to the above grounds for review set out in PAJA, the decision stands to be reviewed and set aside on the principle of legality.

b) Declaration of a national state of disaster by the third respondent on 9 February 2023

79. As indicated in paragraph 100 of my founding affidavit (at p 002-45), the third respondent declared a national state of disaster in contravention of the provisions of section 27(1) of the DMA and without the definition of a "disaster" having been met. A such her decision was *ultra vires* the enabling legislation and stands to be reviewed in terms of section 6(2)(b) of PAJA.
80. The above should be read in conjunction section 6(f)(i) of PAJA in terms whereof the decision stands to be reviewed on the basis that it contravenes the DMA and is not authorised by the empowering provision, being section 27(1) of the DMA.



81. All the existing information at the time of the impugned decision pointed to the fact that there is sufficient existing legislation to deal with the crisis. On 23 January 2023 the third respondent herself confirmed to the President that the crisis did not qualify as a disaster. The impugned decision was therefore materially influenced by an error of fact and/or law and stands to be reviewed in terms of section 6(2)(d) of PAJA.
82. The reasons provided by the third respondent on 3 March 2023 (record at 380 – 390) confirms that she took irrelevant considerations into account and failed to consider relevant considerations, most notably the respective confirmations from Eskom, NECOM, the DPE and National Treasury that there was sufficient existing legislation to deal with the electricity crisis. As such, the impugned decision stands to be review in terms of section 6(2)(e)(iii) of PAJA.
83. The impugned decision further appears to have been made without any independent assessment by the third respondent and without her having applied her mind as to the presentations that were made to her by the second respondent. The decision stood in stark contrast with the advice that she provided to the President on 23 January 2023. The information contained in the record and the reasons given does not support and justify the decision taken. As such it was taken arbitrarily or capriciously and stands to be reviewed in terms of section 6(2)(vi) of PAJA.



84. There is further no rational connection to the empowering provision, the information before the administrator or the reasons given for it by the administrator. The available information did not justify the declaration of a national state of disaster and, following the classification of a national disaster by the second respondent, there was no independent evaluation by the third respondent when she declared a national state of disaster on the same day. As such, the decision stands to be reviewed in terms of section 6(2)(f)(iii) of PAJA.
85. Given the information contained in the record, the decision reached by the third respondent is not one that a reasonable decision-maker would reach. The far-reaching decision is further disproportionate to the end it seeks to achieve, given the history of the electricity crisis in South Africa and the plethora of existing measures and legislation in place to deal with the crisis. As such, the decision stands to be reviewed in terms of section 6(2)(h) of PAJA.
86. The decision was otherwise unconstitutional and unlawful and stands to be reviewed in terms of section 6(2)(i) of PAJA.
87. In the alternative to the above grounds for review set out in PAJA, the decision stands to be reviewed and set aside on the principle of legality.

D. FURTHER RELEVANT CONSIDERATIONS:

88. Part 9 of Eskom's Code of Practice NRS 048-9:2017: *Load Reduction Practices, System Restoration Practices and Critical Load and Essential Load*



Requirements under Power System Emergencies (Record at p 1 – 103) makes specific provision for exemption from load shedding with the approval by NERSA in paragraph 4.4.2 (record at p 24 – 25) thereof. The relevant pages are attached as annexure “FA26”.

89. This clause finds reference in respect of any contention that the declaration of a national state of disaster is needed to allow for certain emergency- and essential services to be exempt from loadshedding, i.e., water services, sanitation services, hospitals and agricultural services, etc.
90. The above is evidenced by the formal parliamentary response attached as annexure “FA27” that was received and published on 9 February 2023 to the question from Mr van Staden from the FF Plus to the Minister of Health.

The question:

- (1) *Whether all government (a) hospitals and (b) clinics in each province are exempt from load shedding under the current Eskom crisis of electricity blackouts; if not, why not; if so, (i) which government (aa) hospitals and (bb) clinics in each province are still not exempt from load shedding and (ii) what measures are being put in place to ensure that all state- and provincial hospitals and clinics are exempt from load shedding;*
- (2) *whether he will make a statement in the matter.*

Reply:




(1) (a-b) Not all government facilities have been exempted from the load-shedding, However, the National Department of Health has provided Eskom with a total of 213 hospitals to be considered for possible exclusion from loadshedding. About 67% of these hospitals are supplied by municipalities while Eskom supplies about 33% of the identified hospitals. Out of the 213 hospitals, 76 hospitals have been exempted of which 26 are directly supplied by Eskom and 50 by Municipalities. The number of hospitals exempted to date have doubled since the meeting held on 22 September 2022 between Eskom and the National Department of Health.

91. These exemptions were made prior to the declaration of a national state of disaster and prove that a state of disaster is not a prerequisite for emergency- and essential services to be exempted from loadshedding. Existing mechanisms exist to achieve such exemptions.
92. Similarly, paragraph 8.6.10 of Eskom's Code of Practice (record at p 54 - 55) deals, for example, with educational facilities and states that it should be included in load shedding. The relevant pages are attached as annexure "FA28". NOTE 2 to this paragraph reads:

"It is possible that arrangements may be made to limit the impact of load shedding on educational facilities at critical times of the academic year through consultation between government and NERSA. This may entail pre-planning




on the system and the use of only curtailment loads whether the system constraint can still be managed.”

93. The above illustrates that a national state of disaster is not required for certain emergency- and essential services to be exempted from loadshedding.

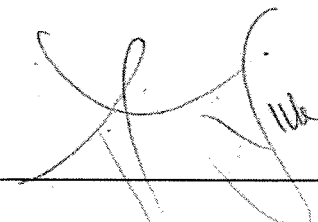
E. CONCLUSION:

94. It is clear from the record that the impugned decisions were taken on a whim and are not supported by the evidence and information available to the second and third respondents at the time when the decisions were made. The reasoning behind the sudden change in position cannot be established from the record.
95. There is further no evidence that the decisions are objectively capable of furthering the purpose for which they were made to the extent that existing legislation and other existing measures put in place by Eskom and other stakeholders cannot already achieve the purpose of reducing and ultimately ending loadshedding.
96. It is submitted that this matter can be differentiated from other national disasters (Covid-19, floods etc) in that a disaster is normally unforeseen and unpredictable. This means Parliament is not able to legislate the requisite and unpredictable emergency measures that may be needed in advance. The electricity crisis is different. In addition to the fact that there is already sufficient

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existing legislation in place, the nature of the crisis is entirely predictable (and has been for years). There is no reason to forego parliamentary oversight and leave the dealing of the disaster almost exclusively in the hands of the executive to allow for virtually unfettered procurement processes and deal-making as was seen during the Covid-19 disaster.

97. For reasons as set out above and in the founding affidavit, I pray for an order in terms of Part B of the notice of motion, read with prayer 1 thereof.



DEPONENT

Signed and sworn before me at JOHANNESBURG on this 7th day of MARCH 2023 after the deponent declared that she knows and understands the content of this declaration, has no objection to taking the prescribed oath and considers the prescribed oath to be binding on her conscience. There has been compliance with the requirements of the Regulations contained in Government Gazette R1258, dated 21 July 1972 (as amended).



COMMISSIONER OF OATHS

TANYA DEMPERS

Praktiserende Prokureur/Practising Attorney
Kommissaris Van Ede / Commissioner of Oaths
992 Justice Mahomed Street
Brooklyn, Pretoria
REPUBLIC OF SOUTH AFRICA

FULL NAMES:

ADDRESS:

EX OFFICIO:

Alternative address :
21 Woodlands Drive
Woodmead Country Club Estate
Building 2
Woodmead

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no: 2023-014861

Before the Honourable Millar J

28 February 2023

In the matter between:

ORGANISATION UNDOING TAX ABUSE NPC
(Registration no: 2012/064213/08)

Applicant

and

THE PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA N.O.

2023 -02- 28

First Respondent

THE HEAD OF NATIONAL DISASTER
MANAGEMENT CENTRE N.O.

Second Respondent

THE MINISTER FOR CO-OPERATIVE
GOVERNANCE AND TRADITIONAL AFFAIRS N.O.

Third Respondent

THE MINISTER OF MINERAL RESOURCES
AND ENERGY N.O.

Fourth Respondent

THE MINISTER OF PUBLIC ENTERPRISES N.O.

Fifth Respondent

SPEAKER OF THE NATIONAL ASSEMBLY N.O.

Sixth Respondent

CHAIRPERSON OF THE NATIONAL COUNCIL
OF PROVINCES N.O.

Seventh Respondent

ESKOM HOLDINGS (SOC) LTD
(Registration no: 2002/015527/20)

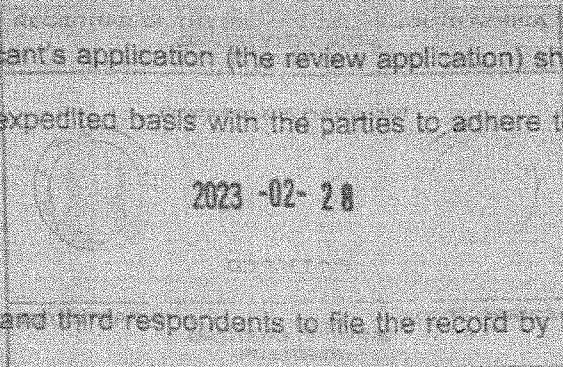
Eighth Respondent

DRAFT ORDER

By agreement between the applicant and the first to fifth respondents, the following is made an order of court:

1. Part A of the applicant's notice of motion set down on the urgent roll of 28 February 2023 where the applicant requests interdictory relief, is removed from the roll.

2. Part B of the applicant's application (the review application) shall be enrolled for hearing on an expedited basis with the parties to adhere to the following timeframes:



- 2.1 the second and third respondents to file the record by Friday 3 March 2023 at 14:00;
 - 2.2 the applicant to file its supplementary founding affidavit by Tuesday 7 March 2023 at 16:00;
 - 2.3 the first to fifth respondents to file their answering affidavits by Friday 10 March 2023 at 16:00;
 - 2.4 the applicant to file its replying affidavit by Monday 13 March 2023 at 14:00.
3. Cost to be cost in the application.

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3



BY ORDER

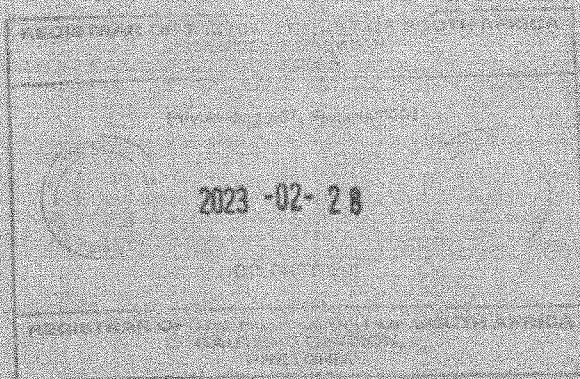
Counsel for the Applicant:
Adv S Mentz
Adv E Propy

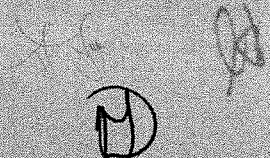
Attorney for the Applicant:
Mrs A Jennings
Jennings Incorporated

Counsels for the 1st - 5th Respondent

Adv B Lakokotla
Adv F Hobden

Attorney for the 1st - 5th Respondent:
State Attorney







8. Part 4: Declaration of a state of disaster

The sixth to eleventh processes, depicted by figure 4.2 of the NDMF, deals with those disasters where (1) the existing legislation and contingency arrangements are inadequate to effectively deal with a local, provincial or national disaster, or (2) other special circumstances warrant the declaration of a state of disaster. In such instances, the executive or council declares a local, provincial or national state of disaster to augment the existing legislation and contingency arrangements, using directives and or Regulations²⁰.

8.1 Process to declare a state of a disaster

The process to declare a state of disaster is subject to the Constitution, the DMA and other legislation, which establishes a variety of administrative structures to control the exercise of this public power. Parliament, Provincial Legislatures and Councils therefore have legislative competence within the confinements of the Constitution whilst subordinate legislative bodies, such as the Minister, Premiers and Councils do not have original legislative competence. They must act within the confines of the enabling legislation, such as the DMA insofar as it relates to declaring a state of disaster, issuing Regulations and or issuing directions.

The making of such delegated legislation by a Minister, a Premier and a Council has been stated by the Constitution as an essential part of the public administration, in that it gives effect to legislative provisions through the implementation of policies, procedures and programmes. However, according to the Promotion of Administrative Justice Act, 2000, (Act No. 3 of 2000) (PAJA) the test to determine if administrative action²¹ taken by the executive of council is just, is based on three elements.

²⁰ Bylaws in the case of a Council.

²¹ in this case declaring a state of disaster, and or making regulations and or issuing directions



CLASSIFICATION AND DECLARATION OF A STATE OF DISASTER



(Element 1) The administrative action must be lawful,

(Element 2) The administrative action must be reasonable; and

(Element 3) The administrative action must be procedurally fair.

In the context of exercising the administrative power to declare a state of disaster, the executive or a council as the case may be, has the power to lawfully declare a state of disaster (element 1) once it is classified by the NDMC, but should only do so after having considered whether it is reasonable (element 2). This requires that the executive or council, in making a decision to declare a state of disaster, exercises sound judgement, fairness and sensibility with regards to the application of existing legislation, the applicable contingency arrangements, the needed Regulations (or bylaws in the case of a Council) and or the needed Directives. This speaks to following sound decision-making procedures based on the facts provided by the disaster assessment report(s) collected, which in turn promotes procedural fairness (element 3). When these elements are put to effective use, it enables the executive or a council to lawfully declare a state of disaster.

8.1.1 Declaration of a local state of disaster

Section 55(1) of the DMA states that in the event of a municipality having primary responsibility for the coordination and management of a local disaster, the Council of that municipality may declare a local state of disaster where,

- (1) the existing legislation and contingency arrangements are inadequate to effectively deal with the local disaster, or
- (2) other special circumstances warrant the declaration of a local state of disaster.



MINISTRY
COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS
REPUBLIC OF SOUTH AFRICA

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"FA16"

Ref no: 21/9/7

His Excellency President MC Ramaphosa
President of the Republic of South Africa
Union Buildings
PRETORIA
0001

Per email: presidentrsa@presidency.gov.za / mike@presidency.gov.za

Dear Mr President,

**NATIONAL ENERGY CRISIS AND THE DECLARATION OF A NATIONAL STATE
OF DISASTER**

The President's request for advice in response to the letter from the Premier of the Western Cape ref 3/2/2 dated 17 January 2023 refers.

The analysis by Premier Winde on the severe impact of prolonged loadshedding on various sectors of society is correct. Households and businesses are suffering under the devastating impact of the rolling blackouts.

With regards to the classification of a national disaster, section 23 of the Disaster Management Act, 57 of 2002 (DMA), regulates principally:

- a) the determination as to whether an event should be regarded as a disaster in terms of the DMA; and
- b) the classification of the disaster - once determined as such - as either a national, provincial or a local disaster.

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Both the determination of a disaster and the classification processes fall within the responsibility of the National Disaster Management Centre (NDMC) which I oversee.

It is also only if and once an event has been determined as a disaster by the NDMC in terms of section 23 of the DMA, that the Minister of Cooperative Governance and Traditional Affairs is empowered by section 27 of the DMA to declare a national state of disaster, provided that the existing legislation and contingency arrangements do not provide adequately for the national executive to deal with the disaster effectively, or other special circumstances warrant the declaration of a national state of disaster.

It is clear, therefore, that a section 27 declaration by the Minister can take place only once an event has been determined by the NDMC to constitute a disaster within the meaning assigned in terms of the DMA.

The NDMC requested the Department of Public Enterprises (DPE) to submit information to outline the actions they are taking to address the matter and specifically to indicate whether there are sufficient legislative measures at the disposal of the DPE and ESKOM to effectively deal with the load shedding crisis.

In response to the request, the DPE indicated they are participating in various workstreams of the National Energy Committee (NECOM) which is a national coordinating structure established to oversee the implementation of five key interventions to deal with the crisis:

- 1) Fix Eskom and improve the availability of existing supply.
- 2) Enable and accelerate private investment in generation capacity.
- 3) Accelerate procurement of new capacity from renewables, gas, and battery storage
- 4) Unleash businesses and households to invest in rooftop solar.
- 5) Fundamentally transform the electricity sector to achieve long-term energy security.

Moreover, the DPE provided a presentation of ESKOM to stakeholders, detailing an action plan, attached hereto as **Annexure A**. The Director-General in the DPE further

confirmed that at this stage, there is adequate national legislation to deal with the loadshedding crisis. The DPE is in the process of obtaining a legal opinion on this matter to confirm as such and has committed to provide the legal opinion once it is received.

The engagements with the wide range of stakeholders, including political parties, labour unions, business associations, community groups, interfaith leaders, traditional leaders, premiers, and mayors to ensure a collective response to this national challenge are important.

We further noted the six-month progress update on the implementation of the Energy Action Plan to end the rolling power cuts that was publicly released by the NECOM.

The NDMC has informed me of their view that whilst the energy crisis that the country is facing may fall within the broad definition of a disaster as set out in section 1 of the DMA, the occurrence does not fall within the application of the DMA as set out in sections 2(1)(b) and 23. There is sufficient national legislation that exists that empower the executive to deal with the prevention and mitigation of the impact of the energy crisis. These include but are not limited to the National Energy Act No. 34 of 2008; the Public Finance Management Act, 1 of 1999; the Preferential Procurement Policy Framework Act, 2000; the Division of Revenue Act; the Constitution of the Republic of South Africa; the Intergovernmental Relations Framework Act and various pieces of legislation that deal with sector related contingencies.

I am further informed that practical measures within the legislative frameworks have already been implemented such as the amendment of schedule 2 of the Electricity Regulation Act to remove the licensing requirement for generation projects, which will significantly accelerate private investment. A new ministerial determination has also been published for 14771 MW of new generation capacity from wind, solar and battery storage to accelerate further bid windows. Furthermore, existing legislation is being used to accelerate implementation of measures to reduce the impact of loadshedding. Various actions have been completed to streamline authorisation processes for energy projects, i.e. transmission infrastructure has been excluded from the need to obtain an environmental authorisation in areas where the environmental impact is low; the timeframe for environmental authorisations has been reduced to 57 days for

projects gazetted as "*Strategic Infrastructure Projects*" the timeframe for registration with NERSA has been reduced from four months to an average of 19 days; the timeframe for grid connection has been reduced from nine months to six months; the timeframe for land-use authorisations for energy projects has been reduced from 90 to 30 days.

The energy crisis therefore does not forthrightly fall within the ambit of the DMA. However, the NDMC continues with the engagements of relevant stakeholders to enable a rational and informed decision as well as proper application of the DMA.

To mitigate the impact of the energy risk, all organs of state are encouraged to adopt relevant plans within the framework of their pieces of legislation.

Furthermore, it is important that organs of state across the spheres of government implement their responsibility in terms of Section 25, 38, 39, 52 and 53 of the DMA that oblige each organ of state, amongst other things, to –

1. conduct a disaster risk assessment for its functional area, including the risk of loadshedding.
2. identify and map risks, areas, ecosystems, communities, and households that are exposed or vulnerable to physical and human-induced threats.
3. prepare a disaster management plan setting out, *inter alia*, the role, responsibilities, and capacity of that organ of state to deal with disaster management and the loadshedding crisis.
4. co-ordinate and align the implementation of its plan with those of other organs of state and institutional role-players; and
5. put in place contingency strategies and emergency procedures in the event of a disaster, including measures to finance these strategies.

As alluded to above, it should be emphasised that the impact of loadshedding is already being addressed by relevant organs of state through contingency arrangements and existing legislation and various structures have been established by government for the coordination of efforts by relevant organs of state in addressing the matter.

It should further be noted that during a special technical MinMEC meeting held on Friday, 20 January 2023, heads of provincial COGTA departments have also been urged to develop plans to address the impact of loadshedding in municipalities.

It follows that the energy crisis should be addressed as a matter of extreme priority noting that the impact is dire across all sectors of society. However, the classification of a disaster in terms of section 23 of the DMA and declaration of a national state of disaster in terms of section 27 of the DMA may not be the appropriate mechanisms to achieve this, particularly as the Department of Public Enterprises and ESKOM have assured us that there is sufficient legislative and other mechanisms to deal with the energy crisis.

It is advisable that the Presidential Coordinating Council (PCC) and other structures established in the Presidency and the Department of Public Enterprises meet frequently to engage organs of state across the spheres to ensure that the principles of cooperative governance as enshrined in the Constitution are adhered to.

Any queries on the contents of this letter may be directed to Dr Elias Sithole, DDG (Head): National Disaster Management Centre on 012 848 4601 / 066 472 8930 and/or Eliass@ndmcc.gov.za in case further information is required.

Yours sincerely,

NC Zuma

DR NKOSAZANA DLAMINI ZUMA, MP

MINISTER

DATE: 23. 01. 2023

[Signature]
(M)

"FA17"
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**MINISTRY
PUBLIC ENTERPRISES
REPUBLIC OF SOUTH AFRICA**

Private Bag X15, Hatfield, 0028, 80 Hamilton Street, Arcadia, Pretoria
Tel: 012 431 1118/1150 Private Bag X9079, Cape Town, 8000
Email: ministry.registry@dpe.gov.za

His Excellency, Mr MC Ramaphosa
President of the Republic of South Africa
Private Bag X1000
PRETORIA
0001

Dear Mr President

NATIONAL ENERGY CRISIS

Your request for advice in response to the letter from the Premier of the Western Cape, bears reference.

We agree that to conform with the principles of cooperative government, there must be sharing of information on the plans to address the energy crisis with provincial and local government to ensure that they deliver in their mandates.

The Premier was part of the Presidential Coordinating Committee (PCC) meeting held on Friday 20 January 2023 where Eskom's presentation and Government's plans to address loadshedding were presented.

Government has always been transparent in the way the issue of loadshedding is being dealt with. Furthermore, Government has been collaborating with different organisations on the energy crisis and continues to do so.

Please find attached the presentation made at the PCC meeting.

Regards,

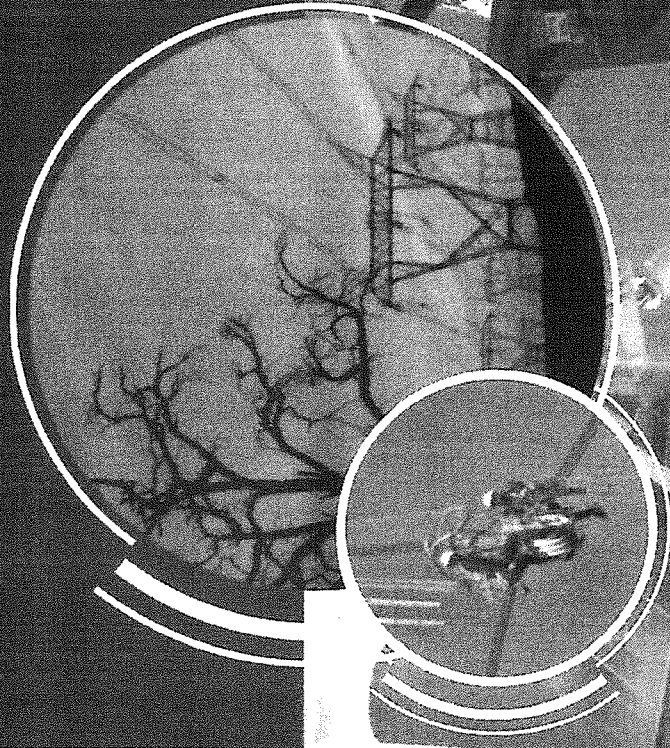
**PJ GORDHAN, MP
MINISTER
DATE: 23-01-2023**

CONFIDENTIAL



Eskom Loadshedding Update

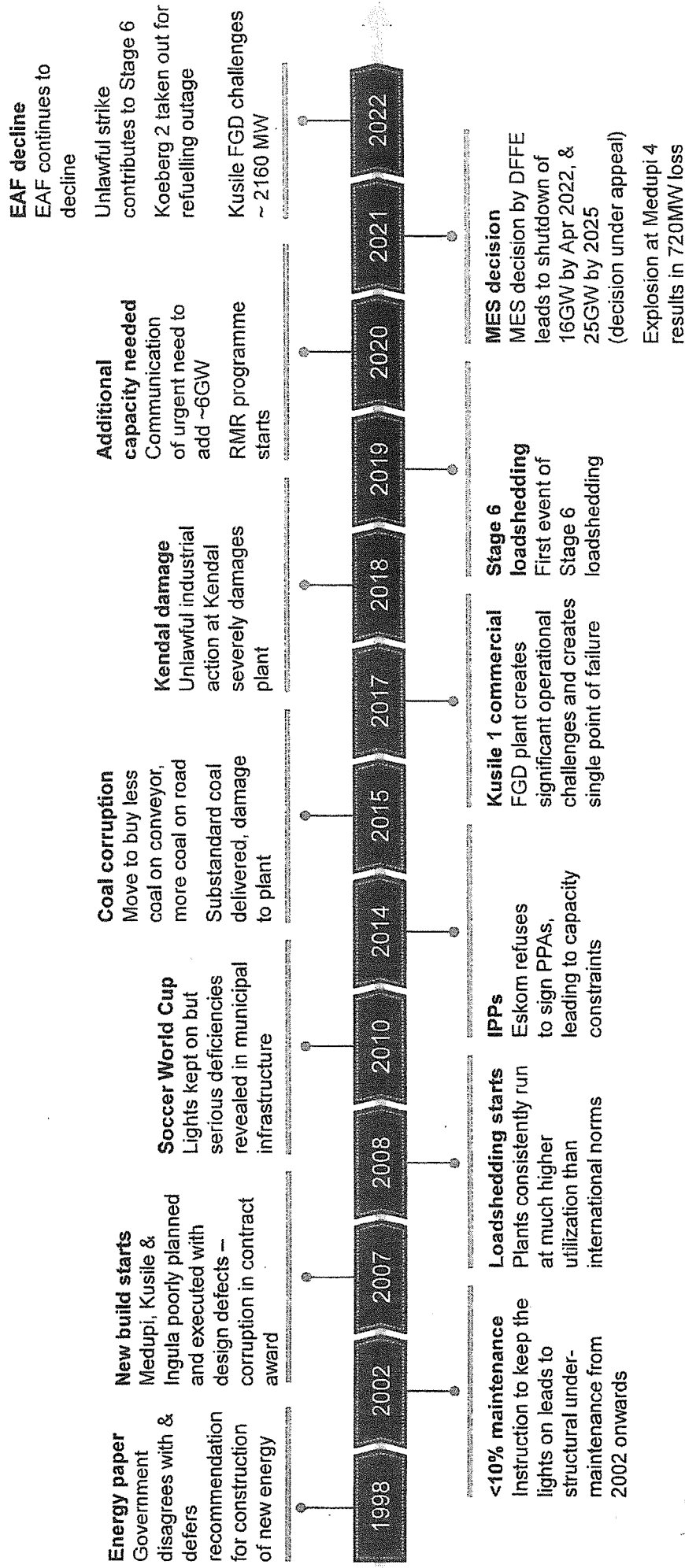
19 January 2023



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"FA18"

The current capacity constraint has been a long time in the making



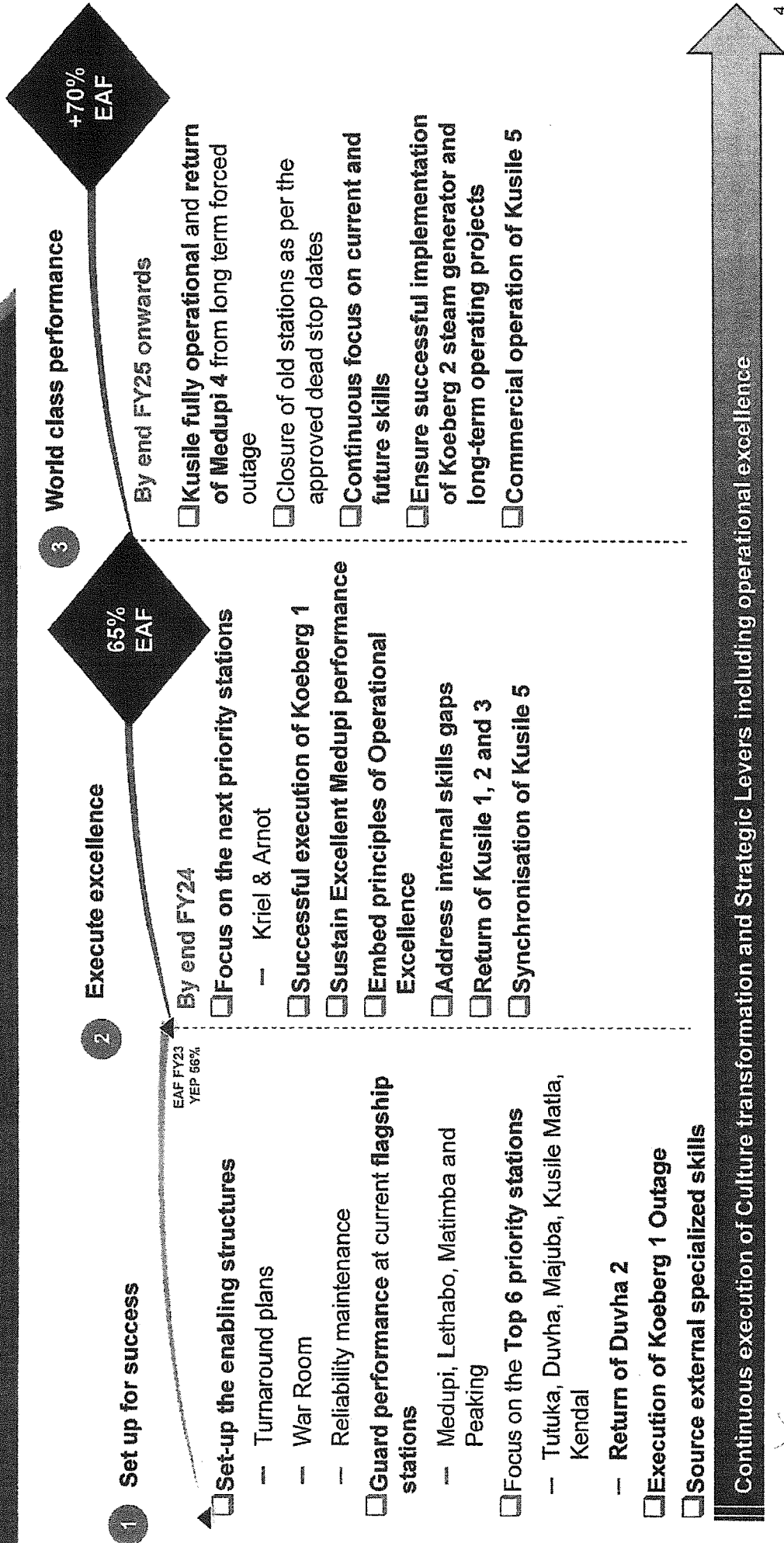
The plan to end load shedding will require EAF recovery, additional capacity and Government enablers



Lever	Description	Potential impact (March 2023)	Comments
1 EAF recovery	<ul style="list-style-type: none"> Roadmap to recovering EAF, focuses on six priority stations while sustaining performance on the rest of the fleet Plan addresses 10 focus areas to improve people, plant and process performance 	~1 862 MW	<ul style="list-style-type: none"> ~6 000 MW over next 24 months Internal enablers required to ensure sustained recovery
2 Additional capacity	<ul style="list-style-type: none"> Additional capacity from increasing imports, Standard Offer, Emergency procurement, Land leasing & inland grid capacity and Section 34 Procurement Completion of legal separation 	~2 900 MW	<ul style="list-style-type: none"> ~2 600 MW is delayed due to NERSA concurrence and alignment on procurement mechanism with DMRE
3 Government enablers	<ul style="list-style-type: none"> External enablers required to ensure Eskom can deliver on the recovery plan Addressing Eskom's financial sustainability, procurement of additional capacity, procurement and environmental policies Interventions by law enforcement agencies to address fraud and corruption 	N/A	<ul style="list-style-type: none"> Immediate action is required to secure fuel oil and diesel funding, 2 000 – 3 000 MW OCGT to enable grid stability

Addressing the electricity crisis will require both the improvement of Eskom's plant performance while urgently bringing additional capacity online

Generation's Operational Recovery Plan is Geared towards Improving EAF from 57% to at least 70% from the end of FY25 onwards



Eskom has regrouped efforts to focus areas to improve people, plant and process performance – essential for turnaround

10 Focus areas	What we are doing
Plant Condition	Increased maintenance within limitations. Establish War room, accelerated spares sourcing. Establish long term contracts.
Inadequate Capacity	Optimise maintenance planning. Engaged to expedite IPPs, Risk Mitigation, etc. Planned repowering of stations shutting.
Skills & Experience	Stability in GE & PSGMS. Appointing Plant Managers. Engaging experienced external experts. Ramping up training and development. Skills/competency audit. Culture of accountability & consequence management. Incentivise & reward staff. Crowdsourcing, Project management.
Fraud & Corruption	Eskom has increased governance controls and performs trending analyses on volumes and prices. Investment in technology, QSSs, training.
Policies & Procedures	Engaged government (DPE, NT) for relaxation of some requirements.
Funding	Aggressive cost cutting. Making funds available for outage and midlife refurb.
Environmental Compliance	Proposed an emission reduction plan that is achievable. Appealed DFFE decision.
Coal	Engaging mines re quality & quantity. Renegotiating agreements. Investing in cost-plus mines. Increasing verification and monitoring.
New Build Defects	Solutions for some areas developed and tested on Medupi 3. Rolled out to other units. Additional solutions to be rolled out to achieve desired performance.
Eskom Rotek Industries	OEM engineering support and oversight on turbine centreline. Improved Quality Assurance process. De-scoping ERI contracts and approach OEMs on specific plant areas, e.g., Kusile FGD

Successes achieved thus far

1. National Treasury has relaxed some requirements which will speed up procurement
2. The allocation of Outage budgeting has improved, seeing signs of improved Outage Readiness
3. Receiving a lot of collaboration among external stakeholders with a willingness to assist Eskom
4. On the 9 Point plan we have seen success in the following areas:
 - I. The new build defect repair. Medupi performance is improving
 - II. Achieving coal stock days and rain readiness program in place

Additional focus to prioritise maintenance at the **Top Six Stations**; Duvha, Kendal, Kusile, Majuba, Matla & Tutuka,

These stations where specifically selected as they are amongst the highest contributors to unplanned load losses. **Any improvement in these stations will result in massive gains in EAF for Generation as a whole**

Current plant status and forward view

- ☐ Experiencing very high levels of plant unreliability and forced outage currently. This is compounded by high planned maintenance.
- ☐ A number of large generating units are off for extended period contributing to the higher plant unavailability and loss of generating capacity: Medupi 4, Kusile 1, 2, 3, Koeberg 1 planned outage, Kusile 5 delayed commissioning.
- ☐ Total unplanned (UCLF/OCLF) at **15 545 MW** which is significantly higher than the planning basis of **13 000 MW**. Planned maintenance (PCLF) at **5 804 MW**.
- ☐ This necessitated the implementation of **Loadshedding stage 4** at least up until Sunday to allow sufficient capacity to meet the demand and conserve reserves at OCGTs and Pump Storage.
- ☐ **Planning to reduce stages of loadshedding during next week** although very much dependent on units returning to service and not incurring further losses.
- ☐ Due to the inherent unreliability that we are experiencing on the coal fleet, there is a **strong likelihood that loadshedding will continue** and that stages can change on short notice due to the potential loss of further generating capacity.
- ☐ Dam and diesel levels will be closely managed, within the current diesel constraints.
- ☐ We are expecting **800 MW** of vacuum load losses for Matimba today and approximately **700 – 800 MW** over the next three days.
- ☐ **Outage slips** remain a core focus area as they contribute significantly to the unplanned allowance (**1 146 MW** currently on slip).

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Projected Loadshedding Outlook

Date	MP OCGTs	EP OCGTs	MP LS	EP LS	MP Reserves	EP Reserves
Thursday 19 Jan	0	0	4	5	1898	1098
Friday 20 Jan	0	3	3	4	1264	1157
Saturday 21 Jan	0	0	3	4	1719	1156
Sunday 22 Jan	0	0	3	4	2670	1265
Monday 23 Jan	0	0	2	4	2454	1356
Tuesday 24 Jan	0	0	1	3	1764	1616
Wednesday 25 Jan	0	0	1	3	2031	1633

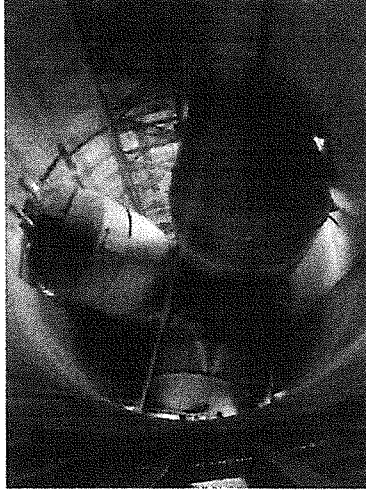
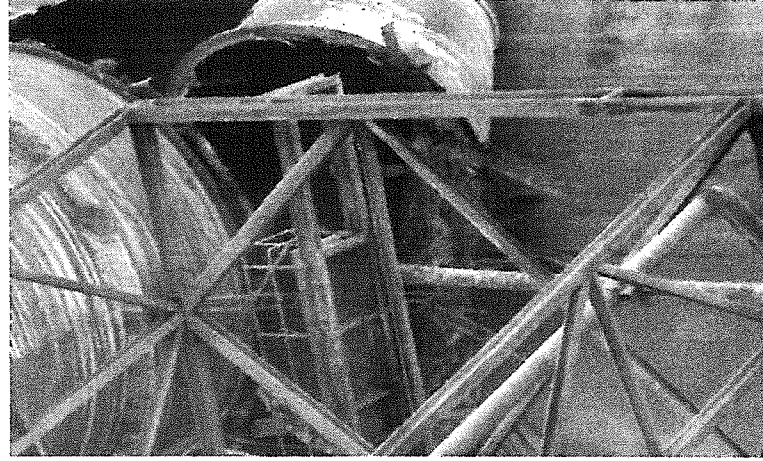
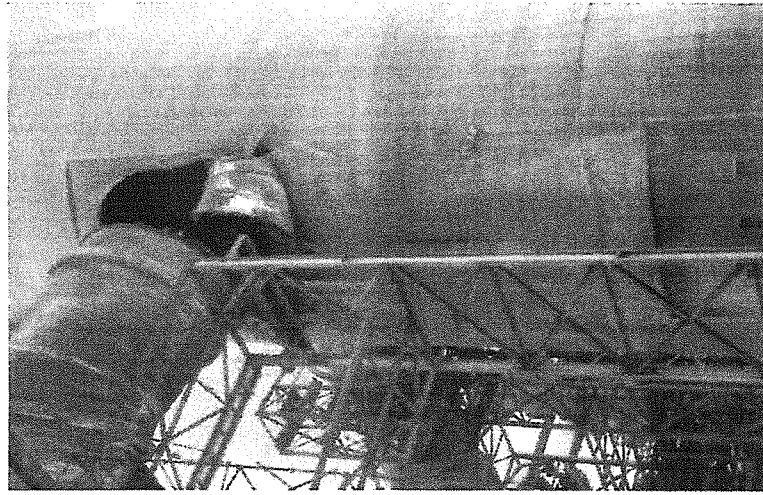
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Kusile 1, 2, 3 flue duct failure

- ☐ Kusile unit 1 flue duct failed on 23 October 2022 when the duct bend where it enters the common unit 1, 2, 3 chimney collapsed.
- ☐ The bend collapsed as a result of excessive weight imposed on the common support platform structure resulting in its failure.
- ☐ This compromised the adjacent Unit 2 and 3 flue duct bends making all three units inoperable.
- ☐ A total of 2160MW unavailable as a result of Kusile 1, 2 and 3 not available.
- ☐ Further investigation in conjunction with the OEM has revealed that there is excessive ash slurry build up in all three units' flues adding a lot of weight which compromises the integrity of the flues and the chimney.
- ☐ Temporary flues for units 1, 2 and 3 will be constructed to return the units to service while repairing the common chimney.
- ☐ It is anticipated that the design construction of the temporary stack will take between 8 and 12 months.
- ☐ Exemption will be sought from DFFE to temporary operate the units while bypassing the FGDs with the temporary stacks.

Incident description

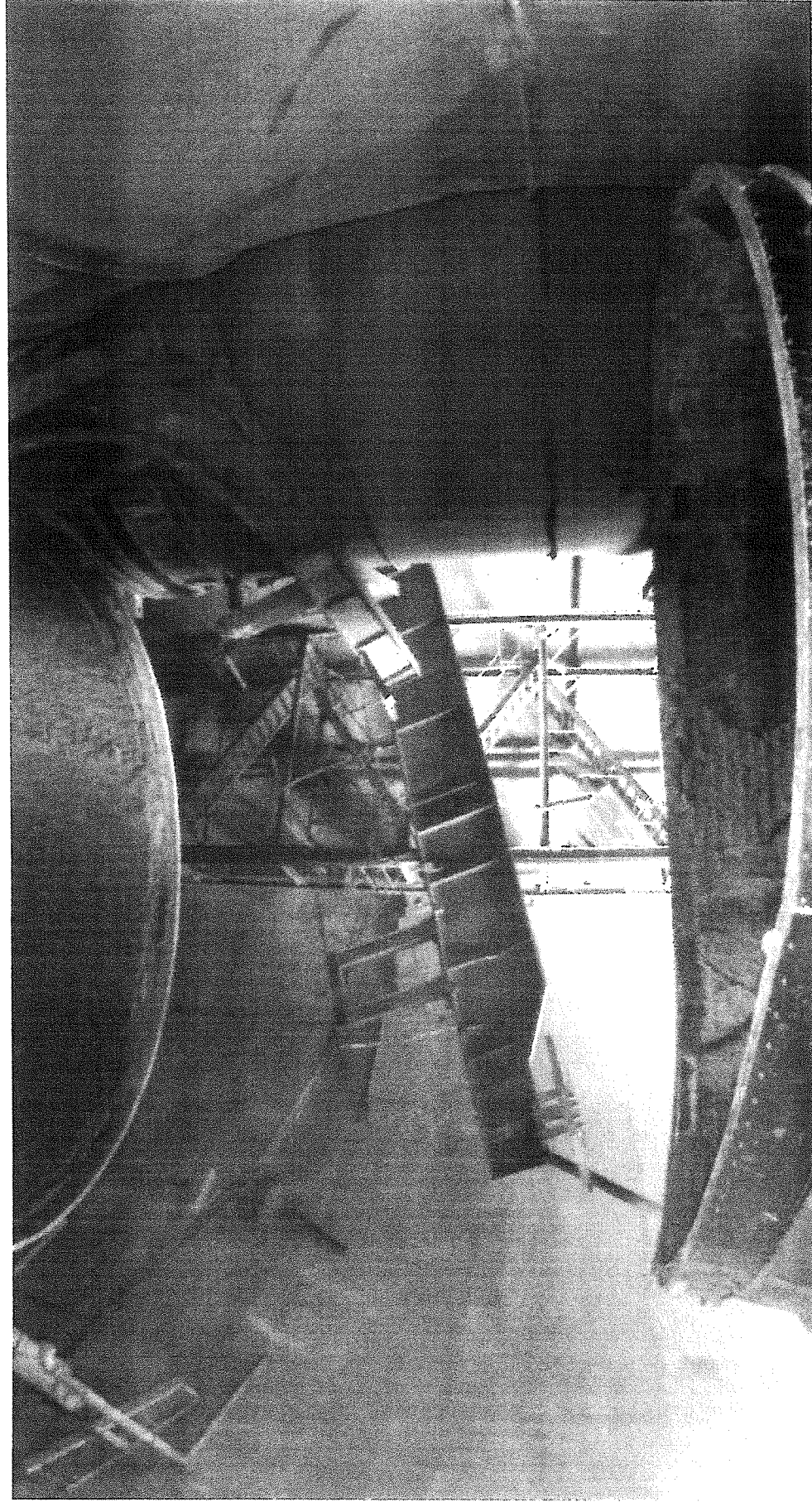
- At approximately 09:45AM on Sunday the 23rd October 2022 while Kusile unit 1 was on a forced outage, the flue duct experienced a structural failure on the horizontal rubber expansion joint, as well as on the rubber expansion joint at the 55m level.



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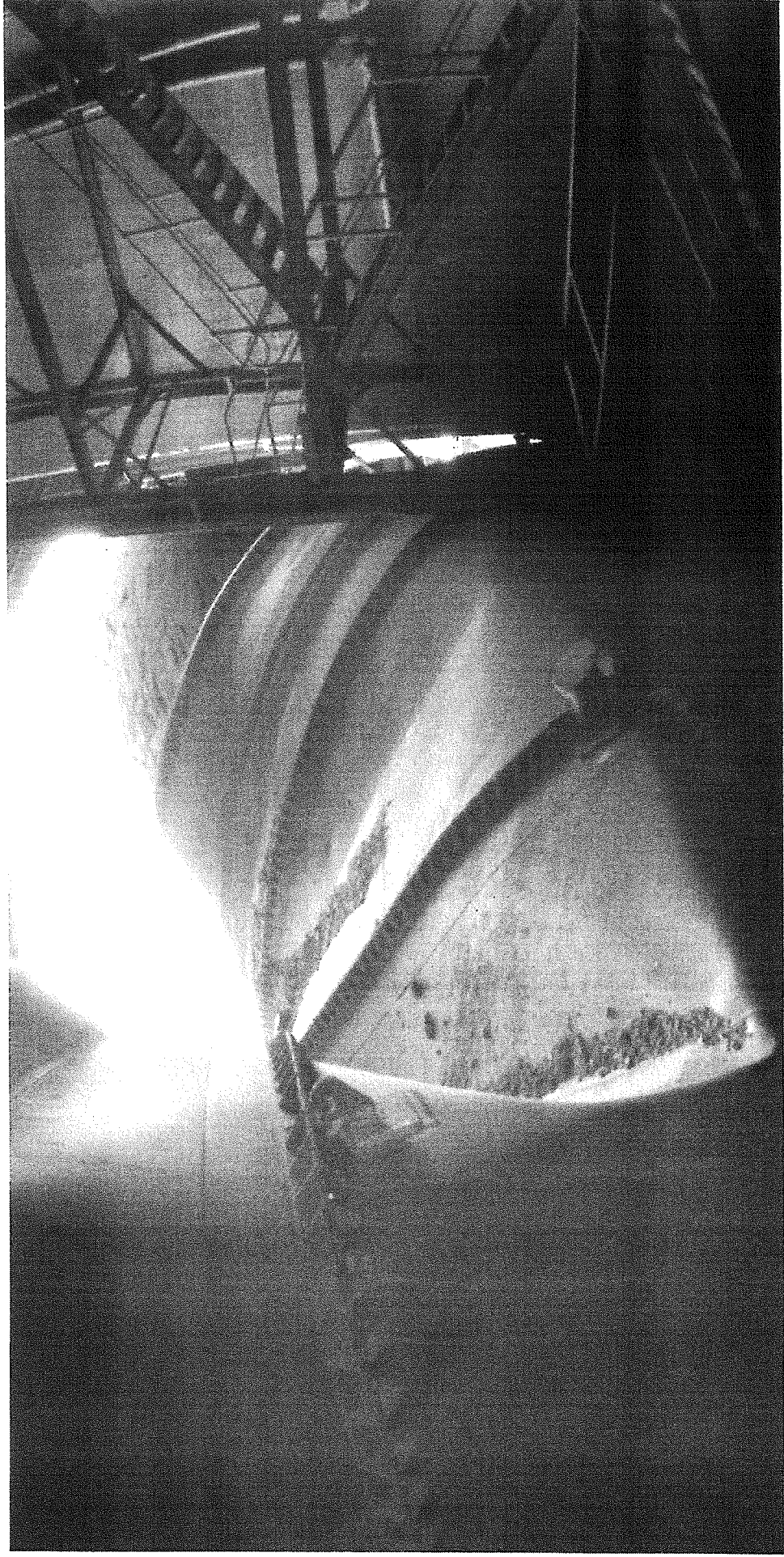
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Supporting platform failure and unit 1 bend dislodged from vertical flue

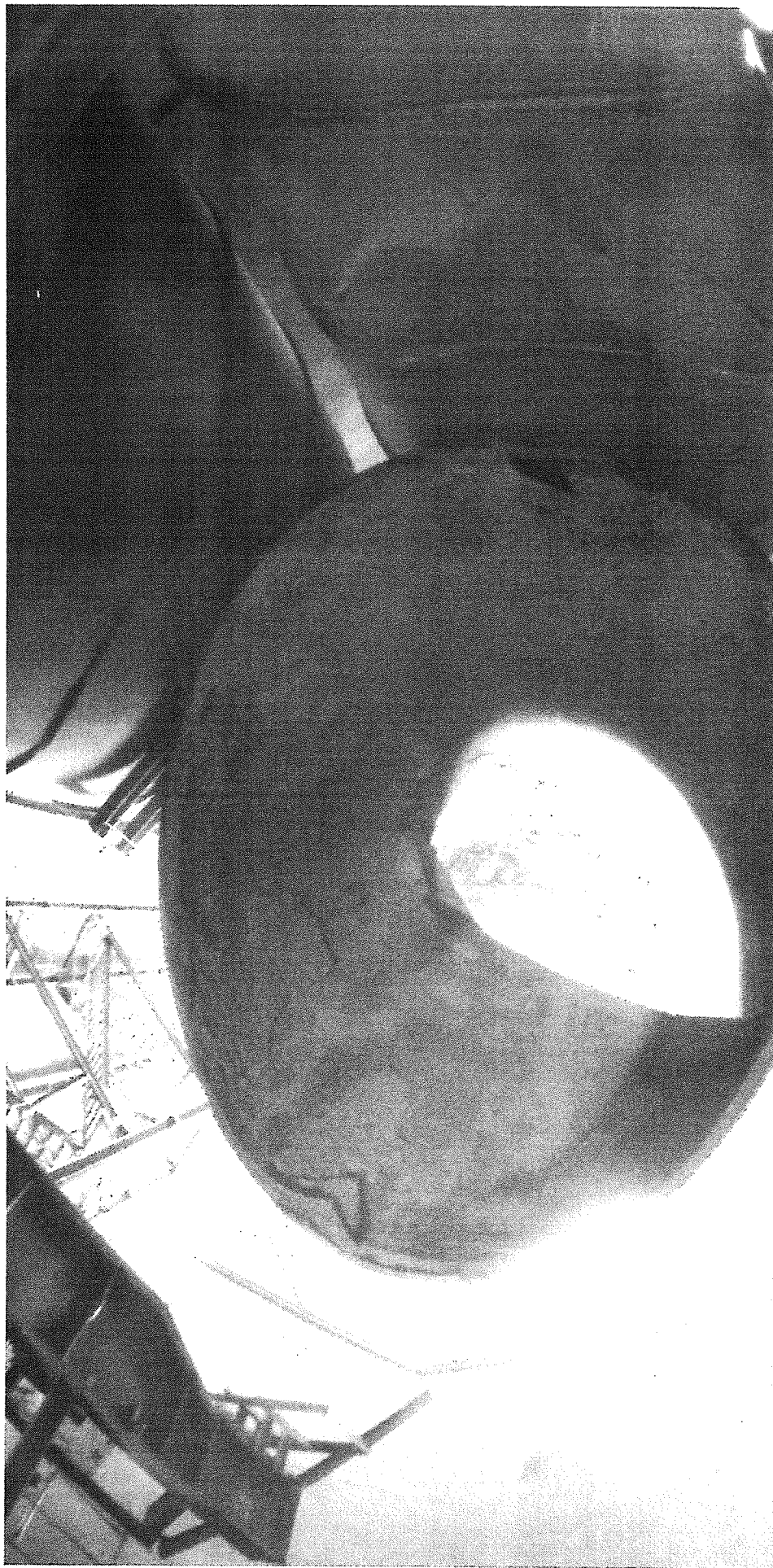


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Unit 1 bend collapse




Unit 1 damage and resting against unit 2 and 3 bends



2

 <p>cooperative governance Department: Cooperative Governance REPUBLIC OF SOUTH AFRICA</p>	<p>SPECIAL HEADS OF CENTRES FORUM MEETING CONSULTATIVE SESSION ON THE MAJOR ELECTRICITY SUPPLY CONSTRAINTS (NATIONAL ELECTRICITY CRISIS)</p> <p>Date: 01 February 2023 Time: 09:00 Venue: Ms Teams</p>
No.	Item
1.	PROCEDURAL MATTERS
1.1	<p>Opening and Welcome</p> <ul style="list-style-type: none"> The Chairperson and Head: National Disaster Management Centre, Dr Elias Sithole welcomed all present and declared the meeting opened at 14:04. In his opening remarks he indicated that this was a special Heads of Centres meeting, with special invites extended to relevant DGs and DDGs. The chairperson also noted that there will also be a special NDMAF later on in the day comprising of all disaster management relevant stakeholders. The purpose of the meeting is to discuss the current energy crisis in the country. The Department of Public Enterprises has been invited along with Eskom, DPME and members of the National Energy Crisis Committee to give presentations in these two special meetings.
1.2	<p>Attendance and Apologies Attendance Register is attached as Annexure 1.</p> <p>Apologies</p> <ol style="list-style-type: none"> Mr de Ruiter: CEO Eskom - represented. Mr Robert Nkuna: DG-DPME – represented. Mr Mabandla: HOC: Eastern Cape – due to cabinet meeting Mr Kiba: HOC: Gauteng PDMC
1.3	<p>Approval of the Agenda Resolution: That the Agenda be adopted without amendments. Mover: Mr J Dyssel Seconder: Mr Tebogo Gaolalwe and Ms A Bruwer</p>
2.	MATTERS FOR CONSIDERATION
2.1	<p>Presentation from Department of Public Enterprises: Plans to mitigate the current Energy Crisis DPE – by DG. Jacky Molisane</p> <p>The presentation by the DPE highlighted the following:</p> <ul style="list-style-type: none"> Eskom legislative mandate and provided a list of exemptions needed to accelerate implementation of the plan. Eskom Action Lab is working on key issues such as emergency procurement, incentivising rooftop solar, enabling procurement and maintenance, implementing demand side measures, and having a 'one-stop-shop' to resolve bottlenecks in delivery. The DPE like Eskom indicated that all these measures can be addressed through existing legislation and working with stakeholders in the respective work streams of the NECOM to improve coordination and cooperation. <p>The forum also noted that a declaration of a state of disaster can really only be done where the current legislation does not provide for any exemption or approvals, but as has been noted from the issues that are requiring exemptions, there are in terms of the current legislation, but if there</p>

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	<p>is not current legislation that covers what you need to do, that is when, then you can declare state of a disaster and we need to identify these meeting. What are the things that need to be done that are not provided in terms of the existing legislation and those are the basis under which you can then declare state of disaster.</p>
2.2	<p>Presentation from NECOM – Overview of the Energy Action Plan by Mr Saul Musker</p> <p>The presentation highlighted the following:</p> <ul style="list-style-type: none"> • National Energy Plan including the roadmap to end severe electricity supply constraint. • Nine workstreams have been established to ensure delivery against the plan, comprising key officials from various government departments and leading experts in academia, business & society. • Stated that good progress has been made in several areas which will result in new capacity being delivered over the next 12 – 18 months which, in 2023 focussed on 8822MW of electricity from initiatives such as imports, rooftop solar, demand response, private sector generation surplus, IPPs, etc. This was in addition to the expected 6000MW expected from improved performance of existing power stations. • Work already underway to streamlining several regulatory processes across departments and indicated that the timeframes can be further reduced through cooperation and engagement in the NECOM using existing legislative measures. <p>Emphasis was also placed on the need to accelerate implementation on an action plan and move with speed in implementing these initiatives. However, the question was raised again to say can the measures that are necessary to respond to the energy crisis be taken under existing legislation and is it simply a case of departments or ministers utilizing the tools available to them, whether it is granting Eskom exemptions from the new generation regulations or from the PFMA or providing exemptions for energy projects from a range of other approvals. What can be done within the existing framework and what would require an alternative framework.</p>
2.3	<p>Presentation by Eskom: Energy Crisis – Mr Thomas Conradie</p> <p>The presentation highlighted the following:</p> <ul style="list-style-type: none"> • That 25 560 MW was available and that the forecast demand was 27 714 MW. • The unplanned outages totalled 17 734MW with 4654MW on planned outages. • There are three levers to address the severe electricity supply constraint being, <i>EAF recovery</i> (with 10 focus areas) that can have a potential 1 862 MW impact; <i>Additional capacity</i> through various imports, emergency procurement and land leasing that can have a potential impact of 2 900 MW; and <i>Government Enablers</i>, which is external to Eskom and can assist the recovery plan.